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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-323

THEODORE W. KHEEL, *et al.*, on behalf of themselves and all other persons similarly situated,

Petitioners,

against

THE PORT OF NEW YORK AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

Petitioners seek a writ of certiorari to review the decision of the Court of Appeals for the Second Circuit, affirming the decision of the District Court for the Southern District of New York, dismissing their complaint for lack of Federal Court jurisdiction. The Court of Appeals' opinion, written by Judge J. Joseph Smith, is reported at 457 F.2d 46 and that of the District Court, written by Judge Harold R. Tyler, is reported at 331 F. Supp. 118.

Statement

This is an action by two New York State Assemblymen and four other individuals who allege that the Port Authority of New York and New Jersey is not fulfilling its duties relating to mass transit. The complaint seeks an order mandating the Port Authority "to formulate and submit" to the District Court or to a Special Master to be appointed by the District Court

> "a plan for the development of mass transportation facilities in the port district as requested by Governors Rockefeller and Cahill." Amended complaint, prayer for relief, para. (f).

The complaint refers to the Governors' desire that the Port Authority (a) effectuate rail access to Kennedy and Newark Airports, (b) take-over Pennsylvania Railroad Station in Newark, New Jersey, and (c) conduct a feasibility study of a new passenger railroad tunnel under the Hudson River between New York and New Jersey. The complaint also seeks a declaration that a 1962 bi-State legislative covenant, which partially restricts the use of Port Authority funds for non-selfsupporting passenger rail transit, is invalid on a host of federal and state constitutional grounds.

The Court of Appeals dismissed the suit for lack of the jurisdictional amount required under 28 U.S.C. § 1331.[1]

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[1] It is also our view, which we argued at length in the courts below, that "federal question" jurisdiction is lacking since the federal constitutional questions contained in petitioners' complaint are raised as replies to a defense which petitioners anticipate the respondents will make. It is, of course, well settled that "federal question" jurisdiction cannot be founded on such a hypothesis. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Gully* v. *& Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908); *Tennessee* v. *First National Bank in Meridian*, 299 U.S. 109 (1936); *Louisville Union & Planters' Bank*, 152 U.S. 454 (1894).

The petition for certiorari asks this Court to consider the following two questions:

> "1. For the purpose of determining whether the amount in controversy exceeds $10,000, may the petitioners aggregate their damages or the value of the benefits to be achieved where petitioners' interests in the suit are common and undivided and are a matter of major importance to the 18,000,000 residents of the port district?
>
> "2. Does an appellate court err when it makes findings of fact with respect to jurisdictional issues which determine the merits of the law suit without giving petitioners the opportunity to prove the error of the Court's findings of fact?" (Petition, pp. 2-3).

Argument

There are three separate and independent reasons why a writ of certiorari should not be granted. First, petitioners have totally failed to set forth any substantial reason why their petition should be granted. Second, neither of the questions presented in the petition was raised in the courts below. Third, petitioners' arguments with regard to both aggregation and the need for a factual hearing are so obviously wrong on the merits that the issuance of a writ of certiorari would be unwarranted.

1. Apparently, petitioners have failed to perceive the purpose of a petition for a writ of certiorari. Instead of attempting to set forth reasons why a writ of certiorari should be granted, petitioners argue the merits of the controversy. Thus, contrary to the basic requirements of Rules 19 and 23(1)(h) of this Court, petitioners do not show any conflict in decisions between the Courts of Appeals, any important question of Federal law which should be decided by this Court, or any conflict between the decision in the instant case and a decision rendered by this Court.

2. Although petitioners have, in both courts below, argued that they satisfied the jurisdictional amount requirement of 28 U.S.C. § 1331, at no time prior to the decision by the Second Circuit did petitioners claim that they had a right to aggregate damages or that it was necessary to hold a hearing to decide the jurisdictional amount question. When the lack of the requisite jurisdictional amount was urged by respondents in the District Court as a ground for dismissing the action, petitioners did not request a hearing but instead submitted an affidavit by Theodore W. Kheel which attempted to show that the damages of each of the named plaintiffs and in particular Mr. Kheel was in excess of $10,000. In pertinent part, the Kheel affidavit alleges that

> "4. . . . because of the increasing undependability and unreliability of mass transportation, I have been forced to use other means of transportation, primarily taxicabs. In an average week, I spend over $35 on taxicabs getting to and from business and professional appointments. I estimate that this expenditure is at least $25 per week more than I would spend if I could rely on the existent mass transportation system in the Port District.
>
> "5. It is clear that the inadequacies of our mass transportation system cost me over $1350 per year, and if I continue to perform my professional duties until normal retirement age (I am presently 57), this expenditure will exceed $10,000 by that time.
>
> * * * *
>
> "7. Of the other plaintiffs, G. Oliver Koppell, Chester Straub and Robert Kheel are also attorneys practicing in New York City, and they are confronted with the same problems in traveling as I am. They are much younger men and no doubt the damages each will suffer during the course of their professional careers will far exceed those which I will sustain. Plaintiffs Ronald W. Haughton and D'Jaris H. Watson are, respectively, President and Vice President of the Board of Mediation for Community

Disputes and mediators and arbitrators in New York City. Their duties require them to travel in the City as much, if not more than the plaintiff attorneys.

"8. It is apparent that the unsatisfactory condition of the mass transportation facilities described in the amended complaint are directly causing monetary damage to *each* of the plaintiffs, and that these damages will continue throughout the professional careers of *each* if such conditions are not corrected. The amount in controversy clearly exceeds $10,000 with respect to *each* of the plaintiffs." (Emphasis added)

This affidavit was part of the Record on Appeal to the Second Circuit, which record, on respondents' request, has been certified to this Court.

Any doubt that the jurisdictional amount issue in the instant case properly rests upon the adequacy of the above allegations contained in the Kheel affidavit is dispelled by the petitioners' own briefs to the Second Circuit. In answer to respondents' contention that the damages alleged were too speculative to satisfy the jurisdictional amount requirement, petitioners did not argue, as they do now, that they were entitled to a factual hearing. Instead, they stated on page 13 of their reply brief that "for jurisdictional purposes, they rely *solely* upon their out-of-pocket expenses incurred prior to the commencement of this action and which they will continue to incur in performing their professional duties." (Emphasis added) Thus, petitioners had the opportunity to submit factual evidence, did in fact submit such evidence, and chose to rely solely on such evidence. Under these circumstances petitioners cannot now complain that they had no factual hearing.

Likewise since there is not one word with regard to aggregation contained in any of petitioners' briefs to the

courts below they cannot now for the first time argue that aggregation should have been permitted. In the words of this Court, "where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

3. Turning briefly to the merits of the controversy it is evident that even if the prior objections to the issuance of a writ of certiorari were lacking, it is so clear that petitioners' claims are erroneous that review by this Court is unwarranted.

The insurmountable jurisdictional obstacle which petitioners face here is that their damages are, as the Second Circuit has ruled, too speculative, remote and indirect to meet the $10,000 test. What is in controversy here is the presence or absence of a statutory duty on the Port Authority's part to become further involved in deficit passenger railroad activities. But the existence or non-existence of such a duty cannot be reduced to a monetary standard. Therefore, even if petitioners were ultimately successful in this litigation and a Federal Court were to order the Port Authority both to prepare and effectuate a mass transit plan, it would still be the height of speculation to hypothesize that passenger rail transportation would thereby be so improved that the petitioners would stop using taxicabs and recommence using mass transportation facilities. The Second Circuit, accepting the uncontested factual allegations of petitioners' affidavit as true, held, as a matter of law, that even if petitioners were successful, they

> "would receive no direct economic benefit, for the desired new subways and buses would be far from realization. At this point it is pure conjecture to suggest when they would appear and how much money they would save plaintiffs." 457 F.2d 46, 49.

Petitioners now contend that "the Court of Appeals conclusion in the absence of any record support that the slowness with which subways are constructed precludes a plaintiff from benefiting in an amount in excess of $10,000 is cavalier, pessimistic and erroneous." (Petition, p. 17). Yet, petitioners' own memorandum of law to the District Court acknowledged that "a mass transportation facility does not come into existence overnight. The lead time from the drawing boards to the completed facility is measured in decades." (page 7)

In view of the Second Circuit's determination that it is the quality rather than the quantity of damages which is legally insufficient, petitioners' argument on aggregation is irrelevant.[2] From the viewpoint of each petitioner or all petitioners the damages alleged are too speculative to satisfy the jurisdictional amount requirement.

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[2] Moreover, aggregation is not permitted in this type of case. Petitioners interests are not "common and undivided" any more than were the interests asserted in the two cases denying aggregation upon which they apparently rely—*Snyder* v. *Harris* (a stockholder's action) and *Gas Service Co.* v. *Coburn* (utility customer alleging overcharge of all customers), both reported at 394 U.S. 332 (1969).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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